Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 225 OF 2006- COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J. A.	**PAUL JOHN MHOZYA Vs. THE REPUBLIC-**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam- Criminal Application No. 43 of 2005-Mlay, J.	Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002-

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J. A.)

CRIMINAL APPEAL NO. 225 OF 2006

PAUL JOHN MHOZYA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mlay, J.)

dated the 24th day of July, 2006
in
Criminal Application No. 43 of 2005

RULING OF THE COURT

28th November, & 18th December,2007

KAJI, J. A.:

The appellant, Paul John Mhozya, is the "complainant" in Criminal Case No. 482 of 2004 in the District Court of Temeke where the accused are Esau Ndimbo and Omari Bakari. His complaint was that, on 15th August, 2004 at Kongowe Mzinga area, within Temeke

Municipality,the accused unlawfully assaulted him by slapping him on his head. The accused denied the allegation.

On 22/10/2004 the appellant adduced evidence as PW1. He was the only prosecution witness on that day. The prosecutor prayed for an adjournment to allow time to bring more witnesses. His prayer was granted and the hearing was adjourned to another date. After seven adjournments without securing the intended witnesses, on 5/8/2005 the prosecution case was closed. The court reserved its ruling on whether or not the accused had a case to answer.

On 1/9/2005 the court ruled that the accused had a case to answer.

The closure of the prosecution case dissatisfied the appellant who wanted two more witnesses to be called. He considered them to be crucial to support his allegation of the assault. He complained to the High Court by way of a chamber summons made under sections 191(2) and 19(3) of the Criminal Procedure Act, Cap 20 R.E. 2002 supported by an affidavit deponed to by himself. In the chamber summons he prayed for the following orders:-

1. *That the applicant as a prosecution witness, be provided with the record of the evidence as is provided for under sections 210(3) of the Criminal Procedure Act before any further proceedings in Criminal Case No. 482 of 2004.*

2. *That section 142 of the Criminal Procedure Act be implemented to secure the attendance of prosecution witnesses Police Constable Amir and Corporal Francis of Kilwa Road Police Station who for the last ten months have failed to appear to testify in Criminal Case No 482 of 2004 despite being summoned by the Public Prosecutor. And in default the possibility of the application of section 143 of the Criminal Procedure Act be considered*

3. *(i) .....*

   (ii) .....

   (iii) .....

   The honorable court declare that it is in the interest of justice, except where the injured is only the United Republic..... the compulsory representation by Police acting as Public Prosecutors .....is incompatible with, and a potential hazard to the whole process of justice.

4. *The right of the complainant (the injured party and not his representative) to attend and participate fully in the*

prosecution, including the right to speak, examine and cross examine be restored the question of representation by a Public Prosecutor notwithstanding.

At the conclusion of the hearing, the application was struck out for having been brought under wrong provisions of the law. The appellant was dissatisfied and lodged this appeal against the whole decision.

In his memorandum of appeal the appellant preferred ten grounds of appeal. At the commencement of hearing the appeal Mr. Boniface, learned Principal State Attorney, who represented the respondent Republic, raised four points of objection. On reflection he abandoned two grounds and addressed the court on the remaining two. The learned Principal State Attorney contended that, since the appellant's application in the High Court was struck out for having been made under wrong provisions of the law, the appellant had an option of rectifying his application by citing the correct provision and refile it in the same court. Secondly, since the decision appealed against did not finally determine the application, it was not appealable in terms of Section 5 (2) (d) of the Appellate Jurisdiction Act, as amended by Act No. 25 of 2002.

On his part the appellant contended that, after his application had been struck out, he had two options. Either to rectify it by citing the correct provisions or to appeal against the ground for striking it out.

He opted for the latter. He pointed out that since he had two options there was no justification to restrict him to either of them, and that the choice was his. Responding on whether the decision was appealable, the respondent contended that, in his view, the decision conclusively determined his application, and that he would only go back to the trial court by way of a review, the option he was not interested in. Thus in his view the appeal is properly before the Court, and that the amendment effected by Act No. 25 of 2002 is not applicable in the instant case.

It is common ground that the appellant's application was struck out for having been made under wrong provisions of the law. The application was made under sections 19 (3) and 191 (3) of the Criminal Procedure Act. Section 19 refers to the right of entry into any place in order to effect arrest; and subsection (3) refers specifically to the right of entry into a house or place in an apartment in the actual occupancy of a woman (not the person to be arrested) who, according to custom, does not appear in public whereby the

arresting officer must, before entering such apartment, give notice to the woman that she is at liberty to withdraw.

After considering this provision of the law the learned judge held the view that it was irrelevant in the instant case in view of the prayers appearing in the chamber summons. This was one of the reasons why the appellant's application was struck out. The learned judge also considered the second provision cited in the Chamber Summons, that is Section 191 (3) of the Criminal Procedure Act. Section 191 gives power to the High Court to change venue by ordering a case to be heard by any court or to be transferred from a subordinate Court to any other Court of equal or superior jurisdiction. Subsection (3) refers to the mode of the application by the applicant in moving the High Court to exercise its transfer powers under the above section. It reads as follows:-

> *191 (3). Every application for the exercise of powers conferred by this section should be made by motion which shall, except where the applicant is the Director of Public Prosecutions, be supported by affidavit.*

The learned judge considered this provision and held the view that it was inconsistent with the prayers in the chamber summons in which the appellant was not asking for an order to transfer his case either from one court to another or from one magistrate to another. He held the view that this provision was not the correct one for the orders sought. Secondly, the learned judge held the view that, even if the application could properly be brought under section 191, it would still be incompetent because section 191 requires such application to be made by way of motion. This was another reason why the learned trial judge struck out the application. Since the application was struck out on legal technicalties, we agree with the learned Principal State Attorney that the remedy available to the appellant was that of refiling it in the same court after rectifying the defects.

On whether the order complained of was appealable, the above summary shows clearly that the application was struck out not on merits but merely on legal technicalties. The merits were not considered and there was no finding on merit. It is therefore our considered view that the decision complained of did not determine the appellant's application conclusively. It was of an interlocutory nature even though it was delivered after the appellant and the

respondent had presented their submissions. It is therefore our considered view that it is not appealable in terms of Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002 which provides:-

> *5 (2) (d): No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the Criminal charge or suit.*

That being the position of the law, we are constrained to sustain also the learned Principal State Attorney's second point of objection that the decision complained of is not appealable.

For the foregoing reasons, we strike out the appeal which has been lodged prematurely.

DATED at DAR ES SALAAM this 18th day of December, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

S. M. K. RUTAKANGWA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

I.P. KITUSI
DEPUTY REGISTRAR